expires, in the absence of any expressed shorter period, on the child attaining the age of 18 years. Reading this section, it is clear that it is a mandatory provision and that being the case, I consider that consideration of moral grounds is of no relevance whatsoever. To that end then the respondent's legal responsibility to maintain the elder of the two children ended when she became 18 on December 8, 1980 and that of the younger daughter will end on May 31, 1985 when she too celebrates her eighteenth birthday. The practical effect of this is that as far as the elder daughter is concerned, the amount of maintenance which have already been paid since December 8, 1980 should have been reduced when she became 18 on that day as after that date the respondent is only legally obliged to maintain the petitioner and the younger of his two daughters until she too reaches 18 next month. That being the case, there would be some remittance due to the respondent of the maintenance he had already made for the elder daughter since December 8, 1980, but as the respondent is not seeking a refund of such remittances, I am loathe to consider it anyway.

Thus, from January 1984 until May 31, 1985, I hold that the respondent is only legally responsible for maintaining only the petitioner and the younger of the two children and having due regard to the respondent's liabilities, his sources of income and the petitioner's financial standing, I consider that $800 will not be an unreasonable sum to expect from the respondent by way of maintenance and accordingly I vary the amount of maintenance from $1,500 to $800 effective from January 6, 1984. On the second daughter attaining her eighteenth birthday next month, this sum of $800 is to be further reduced as the number of persons legally entitled to be maintained by the respondent will be reduced to one, the petitioner herself, and based on similar considerations of the financial positions of both the petitioner and the respondent, I reduce the amount of maintenance to $400 and with effect from June 1, 1985, the amount of maintenance to be paid by the respondent to the petitioner shall be reduced from $800 to $400 per month and to that extent, the maintenance order of May 4, 1979 is further varied. As the respondent's salary had been attached to the extent of $1,500 per month, there will be readjustments to be made based on the reduced amounts of maintenance and I leave this to counsel for both parties to calculate such readjustments. Lastly, as no costs were pleaded in these proceedings, I make no order for costs on this application and accordingly each party is to bear his or her own costs.

Order accordingly.

Solicitors: *Abdul Aziz Ong & Co.; Clough, Thuraisingham, Sivasubramanian & Ramdas.*

SOO WAI SENG v. TAN KIM LOCK

[O.C.J. (Eusoff Chin J.) May 28, 1985]

[Kuala Lumpur – Civil Suit No. 307 of 1980]

Road Traffic – Motor accident – Plaintiff knocked down while trying to cross highway – Road divider with fence to prevent people crossing – Rainy night – Defendant not liable.

Damages – Quantum – Multiple injuries.

The plaintiff was knocked down by the defendant's car as he was attempting to cross the Kelang/Kuala Lumpur Federal Highway on a rainy night. Each side of the highway was 45 feet wide with 4 lanes. There was a centre road divider with a fence of about two to three feet high erected along the divider. This was erected to prevent people from crossing the highway. The defendant had been using this stretch of the highway daily and had never before seen anyone crossing the road there. He first saw the plaintiff when the plaintiff was about eight feet ahead of him in the act of crossing the road. He could not reverse to the right because of the road divider, nor to the left because there were other vehicles. Consequently, the plaintiff was knocked down and suffered multiple injuries.

Held, dismissing the plaintiff's claim: (1) on the facts, the defendant was not liable in any way to causing the accident;

(2) but had the plaintiff succeeded in his claim, on a 100% liability on the part of the defendant, the following damages would have been assessed for the plaintiff:-

Special Damages: hospital charges: $1,030; other expenses: $143; loss of earnings for the period one year and two months when he was unable to work: $2,940;

General Damages: fracture of right femur: $5,000; fracture of both tibia and fibula: $7,500; fracture of superior and inferior ramus: $6,500; lacerations and abrasions to left forearm, right chest and parietal region: $2,500. The total assessment for pain and suffering and loss of amenities for the injuries received would come to $21,500. But since there is overlapping, it is scaled down to $19,000.

Cases referred to:

(1) *Samar bt. Mansor* v. *Mustafa Kamarul Ariffin* [1974] 2 M.L.J. 71.

(2) *Brophy* v. *Shaw, The Times* June 25, 1965 (C.A.), reported in *Bingham's* Motor Claims Cases, 7th Ed. pg. 79.
(3) *Lee Boon Kiat* v. *Ng Sing* [1982] 1 M.L.J. 229.
(4) *Norma binti Semawi* v. *Zaini bin Jaafar* [1984] 1 M.L.J. 1xx.
(5) *Siaw Choon Mun* v. *Government of Malaya, K.S. Dass* on Quantum in Accident Claims at p. 569.
(6) *Hamzah bin Abdul Ghani* v. *Verghese Thomas* [1981] 2 M.L.J. 329.

CIVIL SUIT.

David Tay for the plaintiff.
Miss Chandra Kanagasabai for the defendant.

Cur. Adv. Vult.

Eusoff Chin J. : It is the plaintiff's evidence that on August 27, 1979 at about 9 p.m., he alighted from a friend's motor van along Jalan University, Petaling Jaya. He walked down the road to a bus stop along the Kelang/Kuala Lumpur Federal Highway. Opposite this bus stop was the Employees Provident Fund (E.P.F.) building. He was on the left side of the Federal Highway as one faced Kuala Lumpur. He intended to cross the Federal Highway to the bus stop on the other side of the Federal Highway. He wanted to catch a bus going towards Kelang, to go to his house at 27H Jalan SS 3/27 Petaling Jaya. He was knocked down as he was trying to cross the road. He could not remember where he was knocked down, either on the lanes leading to Kuala Lumpur, or on the lanes leading to Kelang. He agreed there was a road divider with a two to three feet high fence in the middle of the highway. He had to climb this fence to cross the highway.

The defence evidence is that the defendant was returning home going from the direction of Kuala Lumpur towards Petaling Jaya. It was drizzling. He was travelling on the outermost lane (nearest the central road divider) along the Kuala Lumpur/Kelang Federal Highway. He was following other cars ahead of him in that lane. The car immediately ahead of him was about ten to twenty feet from his car.

When he reached that part of the highway in front of the E.P.F. building, he saw a man crossing the road ahead of him from the centre road divider to go to the left side as one faced Kelang. The first time he saw this man was when the man was about eight feet in front of him. He applied the brakes. He could not swerve to the right as there was the road divider, nor could he swerve to the left as there were cars travelling beside him in both the left lane and the centre lane. He could not stop his car, and knocked the pedestrian who was trying to cross the road. According to the defendant, this man had dashed across the road, and then decided to retrace his steps back to the centre road divider when the collision occurred. He lodged a police report – AB2.

Having heard the evidence, I dismissed the plaintiff's claim with costs.

The plaintiff did not know where the collision took place and this could be due to his head injuries which might have affected his memory. But the fact is that he admitted he was going to cross the Federal Highway from the bus-stop on the left of that highway as one faced Kuala Lumpur to the bus-stop on the other side of the highway. The sketch plan at AB3 and key at AB4 show that each of the highway was 45 feet wide. There were four lanes (including the bus lane) leading to Kuala Lumpur, and also four lanes leading to Kelang, with a centre road divider and a fence of about two to three feet high erected along the centre of the road divider. The evidence shows that there was a flyover in front of the E.P.F. building taking traffic across and over the Federal Highway.

My view is that people wishing to cross the Federal Highway should use the flyover. The two to three feet high fence was erected along the central highway divider to prevent people crossing the highway. Each side of the highway had four lanes, indicating the large volume of vehicular traffic using the highway. The slow moving vehicles would be using the left and the centre lanes while the fast ones would use the fast lane which was the one nearest the centre road divider. In good dry weather, to cross each side of the highway during the day when visibility is good would be highly dangerous to the person doing so. But to cross it during the night and in the rain would be an act amounting to committing suicide. In this case it was a miracle that the plaintiff got over to the centre road divider.

I do not attach any blame on the defendant. He was following the other vehicles ahead of him, at their speed. He had been using this stretch of the highway daily, and had never before seen anyone crossing the road there. He never expected anyone to do so. He was about ten to twenty feet behind the front car. He first saw the plaintiff when the plaintiff was about eight feet ahead of him already in the act of crossing the road. He had explained that all he could do in the agony of the moment

was to apply his car brakes. He could not swerve to the right because of the road divider. He could not swerve to the left because there were vehicles travelling along the centre and the left lanes. The plaintiff's counsel had agreed in his submission that it would take a second to travel the distance of eight feet. It was drizzling and the road was wet. Even if the defendant was travelling at 30 m.p.h. it would be impossible for him to stop his car before hitting the plaintiff. From the injuries suffered by the plaintiff which were mainly on the right side of his body, he must have run across the road but dashed back to the centre road divider when he saw the defendant's car coming from his left, but was knocked down before he could reach the road divider.

The case of *Samar bt. Mansor* v. *Mustafa Kamarul Ariffin*[1] was cited to me. There, the plaintiff was crossing from behind a bus. There were vehicles parked on the right side of the road and a crowd had gathered near the scene because of a fire. The Federal Court had by majority held that the defendant should have been more cautious and on the look-out for people who might be crossing the road. But in the instant case, the Federal Highway then was clear. Nothing exceptional was happening at or near the scene which would have caused the defendant to be on the look-out for people crossing the highway. The defendant was merely following the cars ahead of him. He was not even concerned about paying attention to oncoming vehicles because they were travelling on the other side of the road divider. I believe the defendant must have seen the plaintiff as he had described in his evidence, by which time it was too late for him to do anything other than to apply the brakes to stop his car.

In *Brophy* v. *Shaw*,[2] shortly before midnight the defendant was driving at 30 m.p.h. along a dual carriageway keeping close to the offside. The plaintiff and a friend were being chased by the police because they had injured an elderly man in a street brawl. They ran along the pavement past a bus which was just pulling away from a stop and shortly afterwards darted out into the carriage way running across at an angle of 45 degrees. The defendant failed to see the plaintiff and his friend crossing from the defendant's left, even though his headlights were on until they had got a substantial way across the road. They ran right across in front of his car and they were hit by the defendant's car. The plaintiff was seriously injured, and his friend killed. The Court of Appeal held that the defendant was not liable. It had been alleged that he should have seen the men running along the pavement, but his duty, like any other road user, was to exercise reasonable care. He was not under a duty to be a perfectionist. It was going too far to say that the defendant should have observed the negligence and irresponsible action of the two men earlier than he did.

I therefore found the defendant in the case before me not liable in any way to causing this accident. I dismissed the plaintiff's claim with costs

Had the plaintiff succeeded in his claim, on a 100% liability on the part of the defendant, I would have assessed damages for the plaintiff as follows:

1. Special damages:

(a) Hospital charges as agreed by defence counsel as per AB7 – $1,030.00

(b) Expenses incurred by the plaintiff's father to visit the plaintiff 3 times per week during the time the plaintiff was in hospital for 50 days at $1/- bus fare per trip – 21 trips x $1/- – $21.00

(c) Plaintiffs' visits for outpatient treatment after his discharge from the hospital at $5/- taxi fare per trip for 7 trips – $35.00

(d) Medical out patient expenses at $2/- per trip for 7 trips – $14.00

(e) Damage to clothings in the accident – $20.00

(f) Loss of a pair of shoes in the accident – $10.00

(g) Loss of a pair of spectacles – $30.00

(h) Cost of one pair of crutches – $13.00

(i) The evidence shows that the plaintiff was employed as a general worker at Hock Sin Leong Sdn. Bhd., and at the time of accident was earning a salary plus allowance totalling $210/- per month. As a result of the accident, he was unable to work for 1 year and 2 months. I would award him 14 x $210 = $2,940.

Total (a) to (i) = $4,113

After this initial period of one year and two months according to the plaintiff, he was able to do work at a few places until he started his own business some six months before the date of this hearing, and earning about $1000 per month. Since he was not claiming any further pre-trial loss of earning, or any reduction in his earning capacity after the one year and 2 months since his discharge from the hospital, I would not make any further award for loss of earning or reduced earning capacity up to the date of trial.

The plaintiff is not claiming any loss of future

earning since he is now earning almost five times more than he did at the time of accident.

General damages

In the accident, the plaintiff suffered the injuries described in the medical report at AB6 as follows:

> *"Medical Report On Soo Wei Seng*
> *19 years, Male, I.C. No. 5988742*
>
> He was admitted to our hospital on 27.8.79 following a motor vehicle accident. He was rendered unconscious during the accident.
>
> On examination he had the following injuries:-
>
> 1. abrasions both sides of his chest, 3 cm laceration right chest;
> 2. abrasions both forearms, 6 cm laceration extensor surface of left forearm;
> 3. 6 cm laceration right parietal region;
> 4. swelling, deformity right thigh;
> x-ray: transverse fracture midshaft of right femur;
> 5. swelling, deformity right leg,
> x-ray: comminuted fracture right tibia and fibula;
> 6. tender right pubis,
> x-ray: fracture of superior and inferior ramus of R. pubic bone.
>
> After initial resuscitative measures with blood and I/V fluids, a toilet and debridement and suture was done for the laceration. The right leg was in a plaster of paris, and fracture right femur was treated with skeletal traction in a Thomas splint. 6 days after admission he threw a fit on two occasions. This was initially controlled with parenteral valium followed by oral dilantin. Brain scan did not show any abnormalities. EEG showed mild abnormality consistent with post traumatic injury. On 27.9.79 an intramedullary nailing for fractured right femur was done. 2 weeks later a long leg plaster was applied and he was discharged from the ward for follow up at Outpatient clinic. At last follow up on 14.11.79 fracture right tibia and fibula has not united.
>
> Sg: (Dr. E.H. Low)
> Medical Officer
> ORTHO. SURG. UNIT"

The plaintiff had admitted that he had been receiving psychiatric treatments from a specialist at Tong Shin Hospital before the date of the accident. At the start of the case the plaintiff's counsel had attempted to put in 2 further medical reports, but counsel for the defendant had objected to their admission on the ground that although these reports were obtained by the plaintiff in January and May 1984, they were only served on the defence counsel two days before the hearing of this case. The court had decided to hear the plaintiff's witnesses and to adjourn the court to enable the specialists to come to the court to give evidence. However, the plaintiff had decided to close its case after PW1 and PW2 had given their evidence. I would therefore assess the general damages for pain and suffering and loss of amenities based on the evidence and medical report quoted above. But I observe that the plaintiff had to use two crutches when he appeared to give evidence in Court.

For the fracture of the right femur counsel for the defendant, quoting *Lee Boon Kiat* v. *Ng Sing*[3] where the plaintiff was awarded $4,500, suggested a sum of $4,000 while counsel for the plaintiff suggested $7,500. In the present case an intramedullary nailing was done for the fracture right femur. I would assess $5,000 to be a fair award for the fracture to the plaintiff's right femur.

For the fracture to the right tibia and fibula, the defence counsel suggested $5,500 as fair damages, and quoting *Norma binti Semawi* v. *Zaini bin Jaafar*.[4] There, the 2nd plaintiff had suffered fracture of the right tibia only with a small punctured wound of 1 cm x 1 cm, and was awarded $3,000. However, in *Siaw Choo Mun* v. *Government of Malaya*,[5] the court had awarded $14,000 for fracture of both tibia and fibula and 2" shortening. But the plaintiff's counsel suggested $7,500 for this item and I see no reason to disagree with him. I would assess damages to be $7,500 for the fracture of both tibia and fibula.

For the fracture of the superior and inferior ramus of the right pubic bone, the case of *Hamzah bin Abdul Ghani* v. *Verghese Thomas*[6] was referred to me by the defence counsel, where for the fracture of the right ischiopubic ramus (pelvis) the court awarded $4,500. The plaintiff's counsel suggested $6,500. Since in this case the plaintiff had fracture of both the superior and inferior ramus, I would agree with the suggestion of the plaintiff's counsel that a fair award would be $6,500.

For lacerations and abrasions to the plaintiff's left forearm, right chest, and the parietal region I would assess damages to be $2,500.

The total assessment for pain and suffering and loss of amenities for the injuries received would come to $21,500. But since there is overlapping, I would scale it down to $19,000.

I would not assess damages for epilepsy since the plaintiff had not proved that he was suffering

from epilepsy as a result of the injuries received in the accident.

Claim dismissed.

Solicitors: *Murphy & Dunbar; R.K. Nathan & Co.*

THE "YIH SHEN"

LAI LAI YIN v. M.V. "YIH SHEN", OWNERS OF AND OTHER PERSONS INTERESTED

[O.C.J. (Mohamed Dzaiddin J.) May 28 & June 12, 1985]

[Penang – Admiralty in Rem No. 1 of 1984]

Practice & Procedure – Order for sale of vessel – Execution – Application to stay – Court's unfettered discretion to grant or refuse stay – Whether special circumstances exist to grant stay.

Shipping Law – Order for sale of vessel – Execution – Application to stay – Whether sale prior to hearing will prove nugatory – Meaning of "nugatory" – Court's unfettered discretion to grant or refuse stay – Whether special circumstances exist to grant stay.

This was an application for a stay of execution of an order given on April 15, 1985 for the vessel "YIH SHEN" to be appraised and sold *pendente lite*. The grounds of the application as stated in the summons were (1) the defendants intended to appeal against the April 15 Order, (2) unless restrained, the vessel if sold prior to the appeal will render the appeal, if successful, nugatory.

Held: (1) this was a case where the court had an absolute and unfettered discretion to grant or refuse a stay. It was incumbent upon the defendants to show from the affidavit the special circumstances to enable the court to grant a stay of execution;

(2) there was no basis for the allegation that should the appeal against the order be successful, the result would be nugatory if the stay was refused because upon the sale being successful the proceeds thereof would not in this case be paid to the plaintiff but would be deposited into court pending the final disposal of the civil action;

(3) the fact that the defendants believe they have a reasonable chance of success in the appeal is no ground for granting a stay;

(4) in the premises the defendants had not shown any special circumstances to enable the judge to exercise his discretion to grant the application.

Cases referred to:

(1) *Wilson* v. *Church (No. 2)* (1879) 12 Ch. D. 454.

(2) *Orion Property Trust Ltd.* v. *Du Cane Court Ltd.* [1962] 1 W.L.R. 1085.

(3) *Re. Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 M.L.J. 131 F.C.

(4) *Atkins* v. *Great Western Railway Co.* 2 T.L.R. 400.

HIGH COURT.

Yeoh Jin Aik for the plaintiffs.

R. J. Manecksha for the defendants/applicants.

Darshan Singh (watching brief) for the five plaintiffs in A.R. 5/85 who are interested parties.

Cur. Adv. Vult.

Mohamed Dzaiddin J. : This is an application for a stay of execution of the Order made by me given on April 15, 1985 when I ordered the vessel "YIH SHEN" to be appraised and sold *pendente lite* by the Sheriff of the High Court Penang.

The grounds of this application as stated in the summons are that: The defendants being dissatisfied with my Order intend to appeal against my decision (which they have now appealed *vide* Supreme Court Appeal No. 173/85) and the more important ground is that unless restrained the vessel if sold prior to the hearing of the appeal which, if successful, will prove nugatory. The dictionary meaning of the word "nugatory" in the circumstances is "of little value".

The application was supported by the affidavit of Chan Kam Kheong, the authorised agent in Penang of the defendants, affirmed on April 25, 1985 (Encl. 64). He deposed that the defendants have a reasonable chance of success in the appeal and unless the present status is preserved the appeal will be nugatory should the defendants succeed. In addition, he stated that pending hearing of the appeal he was prepared to meet all the necessary expenses of maintaining the ship and its crew.

On behalf of the defendants, Mr. R.J. Manecksha further submitted that the merit of the plaintiffs claim has yet to be determined at a trial proper.

Mr. Yeoh for the plaintiff opposed this application.

This is a case where the Court has an absolute and unfettered discretion to grant or refuse the stay. *Halsbury's* Law of England 4th Edition, Vol. 17, para. 455 states as follows: